In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1865

SHAWNEE PLASTICS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On January 14, 1971, a Board-conducted representation election was held among the production and maintenance employees at the Company's plastics plant in Kuttawa, Kentucky. It resulted in 122 votes for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereafter "the Union"); 3 votes for the Intervenor;[1] 67 votes against either union; and 3 challenged ballots (Pet. App. B, 39, 45-46).

The Company filed timely objections to the election, alleging that certain employees in the unit had been threatened and interrogated by agents and representatives of the Union and of the Intervenor

[1]International Association of Machinists and Aerospace Workers, AFL-CIO.

prior to and during the election (Pet. App. B, 40-41); that the Union had made material misrepresentations of facts prior to the election (Pet. App. B, 41-42); that the Union had made false statements respecting the Union's dues and fees and had impermissibly offered to waive initiation fees in order to obtain employee support (Pet. App. B, 42); and that it had paid employees to assist in the pre-election campaign (Pet. App. B, 66-68). The Regional Director of the National Labor Relations Board conducted an administrative investigation of the Company's objections, affording the parties full opportunity to submit pertinent evidence. The Company submitted affidavits, letters, and handbills allegedly establishing the objectionable conduct (Pet. App. B, 82-132).

The Regional Director issued a report (Pet. App. B, 4569) recommending that the Company's objections be overruled:

(a) He found that, with one exception, the alleged threats were based on hearsay or other unreliable evidence and could not be attributed to the Union or its agents (Pet. App. B, 51). He further found that the threat supported by evidence, even if made by a union agent, did not warrant setting aside the election because it was "isolated" and "ambiguous" (Pet. App. B, 51-52).[2]

(b) The Director also found that the Union had not misrepresented the amount of its dues (Pet. App. B, 57-61); that the Company submitted no evidence supporting its charge that the Union had threatened that the plant

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[2]A person described as "Big Puckett" allegedly told one employee, "you'd better remember us, little fella [sic] or we're going to remember you" (Pet. App. B, 52).

would close should the Union lose the election (Pet. App. B, 54-55); that there was no evidence to support the allegation that the Union paid employees to campaign for it (Pet. App. B, 67-68); that the Union had no duty to advise employees of their right to refrain from union activity (Pet. App. B, 55-57); and that the Union's leaflets concerning the expected advantages of unionization were legitimate campaign propaganda (Pet. App. B, 63-65).

(c) Finally, the Director found that the Union had explained to employees that there would be no initiation fees for anyone who applied for membership prior to the execution of a collective bargaining agreement with the Company, but that employees seeking to join the Union after an agreement was signed would have to pay the standard initiation fee (Pet. App. B, 60). He concluded that such a waiver was not unlawful (Pet. App. B, 61).

The Board overruled the Company's exceptions to the Regional Director's report, and certified the Union (Pet. App. B, 77-81). The Company then refused to bargain with the Union and the Board found the Company's refusal violated Section 8(a)(5) and (1) of the National Labor Relations Act, and issued a bargaining order (Pet. App. B, 17-29).

2. The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A, 2-5). The court held that "the statements [relied on by petitioner in its objections] are ambiguous, based on hearsay and self-serving declarations. They do not, in our judgment, allege facts which if proven would be cause for setting aside the election. Consequently, we conclude that the Board did not abuse its discretion

and that the order should be enforced" (Pet. App. A, 5).The court further held that the waiver of initiation fees here was distinguishable from that involved in *National Labor Relations Board v. Savair Mfg. Co.*, 414 U.S. 270, and did not interfere with employee free choice in the election (Pet. App. A, 5, note).

3. Petitioner asserts (Pet. 2), that the court of appeals, contrary to Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e), "reviewed the record in the instant case by application of an 'arbitrary and capricious' standard." The court did state that the Board was not "arbitrary and capricious" in denying petitioner an evidentiary hearing on its objections. But it stated this only after ruling that the evidence on which petitioner relied was lacking in probative value. The court concluded correctly that the Board "did not abuse its discretion" in declining to hold a hearing when the facts alleged, if proven, would not be cause for setting aside the election (Pet. App. A, 5).

4. Petitioner contends (Pet. 12-14) that the Union's waiver of initiation fees was improper under this Court's decision in *Savair, supra.* In *Savair,* the Court held that a union's waiver of initiation fees for employees who signed authorization cards prior to an election was impermissible because it allows "the union to buy endorsements and paint a false portrait of employee support during its election campaign." 414 U.S. at 277. Since here the waiver was open not only before the election but to any employee who joined the Union prior to execution of a collective agreement (see Pet. App. B, 60), it was not a purchase of votes or a distortion of the election. Indeed, in *Savair*, the

Court specifically recognized that such an extended waiver offer would be valid. 414 U.S. at 274, n. 4. See also *B.F. Goodrich Tire Co.*, 209 NLRB No. 182.

Petitioner contends that the statement in the Union's leaflet that "Any worker in the plant at the time of the election will be exempt from an initiation fee!" (Pet. 12) is a "clear implication [of] * * * waiver of fees in exchange for support for the union" (Pet. 13). In the context of other statements made, however, the quoted language merely indicates that all present employees were covered by the offer; it did not condition the offer upon their joining the Union before the election. Cf. Pet. App. B, 60.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1974.